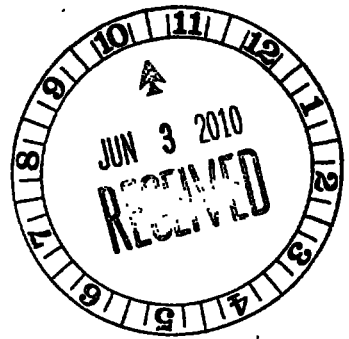


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June 2, 2010

227 202

BY FEDERAL EXPRESS

Cynthia T. Brown, Esq.
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 "E" Street S.W.
Washington, D.C. 20423-001

ENTERED
Office of Proceedings

JUN 3 - 2010

Part of
Public Record

Re: MC-F 21035, Stage Group plc and Coach USA, Inc., et al.
Acquisition of Control – Twin America LLC

Dear Ms. Brown:

As you know, we represent Continental Guest Services Corporation ("CGSC") in connection with the above-referenced proceeding. I write in furtherance of our letter of May 28, 2010 in order to enclose a copy of the transcript of the oral argument held on May 27, 2010 (the "Transcript") in CGSC's state court antitrust action entitled Continental Guest Services Corp. v. International Bus Services, Inc., et al., Index No. 600643/10 (Sup. Ct. N.Y. Co.) (the "State Action"), that is asserted against certain of the Applicants.

We note that conspicuous in its absence from the Transcript is any objection to CGSC's reference, description and/or use of Exhibit 1 to the Chan Declaration by certain of the Applicants' counsel, let alone any inference that such document is "confidential," even though parts of it were read into the record.

Accordingly, for the reasons set forth herein and in our prior letters, it is respectfully submitted that the STB should consider the positions asserted by CGSC when ruling on the subject Application and deny Applicants' request to find that such document is confidential and to redact Exhibit 1 and all references to it from CGSC's papers when posting them on the STB's website.

Respectfully,

Mark A. Berman

cc: David H. Coburn, Esq. (by federal express w/enclosure)
Karen Fleming, Esq. (by federal express w/ enclosure)
James Yoon, Esq. (by federal express w/ enclosure)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BELKIS MARTINEZ, being duly sworn, deposes and says:

1. I am over 18 years of age, am not a party to this action, and reside in New York State.

2. On the 2nd day of June, 2010, I served true copies of the within letter, with a copy of the transcript, from Mark A. Berman to Cynthia T. Brown, Esq., dated June 2, 2010, upon:

David H. Coburn, Esq.
Steptoe & Johnson, LLP
1330 Connecticut Avenue NW
Washington, DC 20036

Karen Fleming
Transport Workers Union of America
AFL-CIO, Local 225
10 Banta Place, Suite 108
Hackensack, New Jersey 07601 .

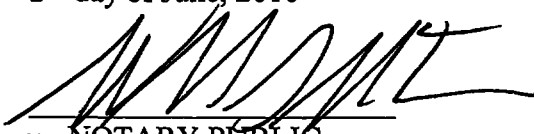
James Yoon, Esq.
120 Broadway
Suite 26C
New York, New York 10271

3. Service was effectuated by delivering same to all of the above by Federal Express courier for standard overnight delivery, Airbill Nos. 8717 8319 5106, 8717 8319 5058 and 8717 8319 5069, respectively.



BELKIS MARTINEZ

Sworn to before me this
2nd day of June, 2010



NOTARY PUBLIC
WILLIAM D. MCCRACKEN
Notary Public, State of New York
No. 02MC6117452
Qualified in New York County
Commission Expires Oct. 25, 2008 *12*



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 53

-----x
CONTINENTAL GUEST SERVICES CORPORATION,

Plaintiff,

-against-

Index No.
600643/10

INTERNATIONAL BUS SERVICE, INC., d/b/a GRAY
LINE NEW YORK, CITY SIGHTS TWIN LLC, d/b/a
CITY SIGHTS NEW YORK, BATTERY PARK HOTEL
MANAGEMENT LLC, HAMPTON INN TIMES SQUARE
NORTH, HILTON GARDEN INN TIMES SQUARE, NEW
YORK WEST 35TH STREET HGI, ON THE AVE HOTEL,
THE PARAMOUNT HOTEL NEW YORK, PARK CENTRAL
HOTEL (DE) LLC, THIRTY EAST 30TH STREET
OWNER LLC, TIMES SQUARE HOTEL OPERATING
LESSEE LLC, LEXINGTON HOTEL LLC, W2001
METROPOLITAN HOTEL OPERATING LESSEE LLC,
and HIGHGATE HOTELS LP,

Defendants.

-----x

May 27, 2010
60 Centre Street
New York, NY 10007

B e f o r e :

HON. CHARLES E. RAMOS, Justice.

A p p e a r a n c e s :

GANFER & SHORE, LLP
Attorneys for Plaintiff

360 Lexington Avenue
New York, New York 10017

BY: MARK A. BERMAN, ESQ., and
GABRIEL LEVINSON, ESQ., and
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MAYER BROWN, LLP

Attorneys for Defendant INTERNATIONAL BUS SERVICE, INC.
1675 Broadway

New York, New York 10019

BY: S. CHRISTOPHER PROVENZANO, ESQ., and
RICHARD M. STEUER, ESQ.

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8 MICHAEL P. A. COHEN, ESQ., pro haec vice

9
10 SILLER WILK, LLP
11 Attorneys for "The Hotel" Defendants
12 675 Third Avenue
13 New York, New York 10017
14 BY: ALAN D. ZUCKERBROD, ESQ.

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16 OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
17 Antitrust Bureau
18 120 Broadway, Suite 26C
19 New York, New York 10271
20 BY: JAMES YOON, ESQ.,
21 Assistant Attorney General

22
23 MINUTES OF PROCEEDINGS

24
25 Reported By:
26 William L. Kutsch
Senior Court Reporter

1 Proceedings

2 THE COURT: Good morning.

3 MR. BERMAN: Good morning.

4 MR. COHEN: Good morning, your Honor.

5 MR. ZUCKERBROD: Good morning.

6 THE COURT: All right. These are defendants'
7 motions; correct?

8 MR. BERMAN: No, your Honor. It's plaintiff's
9 motion. It's the oral argument on the preliminary
10 injunction motion today as well as motions to dismiss.

11 THE COURT: So there are cross-motions.

12 MR. BREEN: Your Honor, before we start, there is
13 a pro haec vice motion that's pending with regard to Mr.
14 Cohen.

15 THE COURT: Do I have the paperwork here?

16 MR. BREEN: We submitted it in March. I could
17 hand it up.

18 THE COURT: Any opposition, your Honor.

19 MR. BERMAN: No.

20 THE COURT: Welcome to New York.

21 MR. PROVENZANO: Your Honor, Chris Provenzano for
22 IBS. We have a pro haec motion, as well.

23 THE COURT: Just make sure the paperwork gets to
24 me.

25 MR. BERMAN: No objection to that either.

26 THE COURT: Proceed.

Proceedings

MR. BERMAN: Your Honor, Mark Berman from the law firm of Ganfer & Shore, along with my associates --

THE COURT: You know what? Let's reverse the order. I know about the case. Let's hear the motion to dismiss, because if I'm going to dismiss the case, then let's get that out of the way.

Who wants to go first on the motion to dismiss?

MR. COHEN: Your Honor, Michael Cohen with Paul Hastings law firm representing Twin America. And I will be presenting argument on the motion to dismiss.

THE COURT: Why don't you use the lectern. You can put your files up on the jury box.

MR. COHEN: Your Honor, part of our motion to dismiss is based on what we believe is a failure to plead irreparable harm with the injunctive relief. We will reserve that with the court's permission for the preliminary injunction motion.

THE COURT: Sure.

MR. COHEN: And concentrate on what we think are unique to the motion to dismiss.

Judge, they made two representations initially in this case to obtain injunctive relief. The first was that they needed access to Twin America ticket vouchers in order to stay in business. And that's the irreparable harm issue that I'll separate out.

Proceedings

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2 The second representation that they made to this
3 court was that the hotels are the primary method of
4 distributing Twin America double-decker bus tour tickets.
5 And the reason that they made that representation, Judge,
6 is that it's key to their theory of the case, which is that
7 there is nothing illegal about Twin America starting a
8 concierge service unless it violates the Donnelly Act, and
9 the only way it can violate the Donnelly Act is if it
10 somehow resulted in Twin America being able to monopolize
11 the double-decker bus market by locking out its
12 competition.

13 In other words, if Twin America were to take over
14 the hotel desks, it would lock out competition by not
15 selling other entrants' tickets; therefore, be able to
16 monopolize the market.

17 That fact, Judge, is fundamentally incorrect.

18 THE COURT: Well, but it's a fact. It's not an
19 interpretation of the contract; is it? It's not a matter
20 of statute or of common law. It's a fact.

21 This is a 3211 motion. I'm not supposed to be
22 deciding facts on a 3211 motion.

23 MR. COHEN: Judge, it is a fact but it's a fact
24 that's in the record and it's a fact that the court can
25 certainly consider --

26 THE COURT: In your client's affidavits.

1 Proceedings

2 MR. COHEN: In the client's affidavits and in this
3 court, Judge --

4 THE COURT: But this is a 3211 motion. You give
5 me an impressive 3212 motion to dismiss for summary
6 judgment, fine, but this is -- it's premature.

7 MR. COHEN: Judge, your Honor, in a normal
8 circumstance, I'd see the point of the prematurity.

9 In this circumstance, we believe that under
10 3211(c) when you do have the affidavits in the record that
11 show an uncontested fact, you can consider that fact and
12 you can consider it in a summary judgment way.

13 At the very least, the Kaufman case indicates,
14 Judge, that although we have put in a fact, if you will, an
15 uncontested fact, it may change the standard --

16 THE COURT: I lost count of how many factual
17 affidavits there are in these motions.

18 MR. COHEN: Judge, this is one fact, one
19 uncontested fact that is the central claim in the case.
20 And --

21 THE COURT: How can you say it's an uncontested
22 fact? There is an allegation in the complaint. Are you
23 saying that your argument is based upon the allegations in
24 the complaint? No. Your argument is based upon
25 allegations contained in your client's affidavit. The
26 plaintiff has no obligation to contest that factual

1 Proceedings

2 affidavit on a motion under 3211. None whatsoever.

3 MR. COHEN: What we are saying, Judge, is that the
4 reason that we say it's uncontested is that it hasn't been
5 contested in the complaint. It's not contrary to the
6 complaint. The complaint alleges that this is the theory.
7 The theory is, We will take over the hotel markets. What
8 has come to light in the record is that the hotel markets
9 are a very small channel in this case. There is no way you
10 can lock out competition.

11 THE COURT: I cannot decide a motion to dismiss
12 based upon what you say are uncontested facts. There are
13 no 19-a statements in a motion under 3211. I don't know
14 what are contested facts. You can put an answer in
15 tomorrow and the day after tomorrow move for summary
16 judgment; that's not a problem. But -- and then you will
17 have the right to say, Your Honor, this is uncontested, or
18 it's contested only to a meaningless extent.

19 MR. COHEN: Let me be mindful of the court's time
20 and the court's points.

21 THE COURT: Just be mindful of my reversal record.

22 MR. COHEN: Precisely. And let me take an
23 approach that won't come close to the reversal side of the
24 fence, and I will move away from the fact and save that
25 fact for the preliminary injunction, as well.

26 THE COURT: Good.

Proceedings

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2 MR. COHEN: Our motion to dismiss is based
3 essentially on three or four points, and I'll go through
4 them in order.

5 The first and foremost point is the failure and
6 inability to allege a market in this case that we can
7 monopolize. And I will go back to -- the allegation in the
8 complaint is, in essence, that we can somehow take over
9 this hotel concierge market.

10 THE COURT: Isn't that sufficient by way of
11 allegation?

12 MR. COHEN: It's not sufficient, Judge, because --

13 THE COURT: What do they have to allege?

14 MR. COHEN: They have to allege that that market
15 is plausible. They have to allege that it's an antitrust
16 market. They have to allege that the hotel channel of
17 distribution is a unique market under antitrust rules by
18 reference to the rule of interchangeability and
19 cross-elasticity.

20 THE COURT: Let's assume you are right, and I give
21 them leave to replead, and they replead it.

22 MR. COHEN: They can't plead it here, Judge.

23 THE COURT: Why not?

24 MR. COHEN: They can't plead it here because they
25 cannot plead and have not pled that New York City tourists
26 only purchase through the hotel channel. They have not --

1 Proceedings

2 THE COURT: Why can't they plead that? I didn't
3 say why can't they prove it. Why can't they plead that?

4 MR. COHEN: They haven't pled it, Judge, because
5 -- well, they can't plead it for reasons that I won't get
6 you --

7 THE COURT: I'm telling you, I can see this motion
8 coming right back to me as a 3212 motion, but I'm really
9 stymied by it. I was reading your briefs, nice logical
10 arguments, and I said, Well, wait a minute, this is not a
11 3212 motion. I checked at the front. It's not.

12 MR. COHEN: So, Judge, let me back up then and
13 talk about the 3211 pleading requirement and why it's
14 important to make a pleading.

15 Why it is important to make a pleading? All too
16 often in antitrust cases, all too often in antitrust cases,
17 we get a plaintiff who comes up with a market that the
18 Belford (phonetic) court called the proverbial -- what was
19 it -- "red-haired, bearded, one-eyed man with a limp"
20 market. They, in essence, defined the market so narrowly
21 to create the appearance that there is something nefarious
22 going on or that there is market power. And that does
23 create -- if you could just plead that, that market, and
24 get away with it, that creates an awful lot of complex
25 commercial litigation over something that should never go
26 forward.

1 Proceedings

2 And that's why the cases, Judge, say to
3 plaintiffs, you know, at a pleading stage, at a motion to
4 dismiss stage, you have to plead cross-elasticity and
5 interchangeability. And I will define those concepts in a
6 way that makes sense.

7 And the reason the courts do it is because they
8 don't want these cases going forward over years for summary
9 judgment when there was never a viable market in the first
10 place; thus the interchangeability/cross-elasticity rule.
11 What that means is, I'll take them both, but one first,
12 interchangeability.

13 Interchangeability means that the plaintiff must
14 allege all of the places and all of the substitutes for the
15 product and then say why and where those substitutes end.

16 So, if it's an ice cream market, a plaintiff can't
17 allege it's a vanilla ice cream market without alleging
18 that there are other flavors of ice cream and types of ice
19 cream and size of ice cream, and that's an example from the
20 Menasha case that we put in our briefs.

21 Now I will move to cross-elasticity.
22 Cross-elasticity is defined in a market by movements in
23 price. When you raise the price of a product, does it
24 shift demand and purchases to substitute products. If so,
25 those substitute products should be in the market.

26 The reason it's not just a pleading requirement is

Proceedings

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2 that without pleading cross-elasticity and
3 interchangeability, you can't really go forward in an
4 understandable way of what the antitrust claims are and
5 shouldn't be permitted to proceed with those antitrust
6 claims without first defining the market so you can define
7 the effects.

8 So let me go back to the hotel distribution
9 channel market that they have alleged, and I'm going to
10 point you to a couple of cases that talk about why this
11 matters on a motion to dismiss.

12 They have alleged hotel distribution. They have
13 not alleged all of the other places that double-decker tour
14 power bus tour passengers period can get their tickets.
15 They haven't alleged -- and they know those, they know
16 them, they haven't alleged that they get tickets at the
17 visitors centers, they haven't alleged that they also get
18 tickets on the street.

19 THE COURT: I do not recall how specifically, but
20 do they allege these are the only outlets, the ones that
21 you described they described in their complaint?

22 MR. COHEN: They actually do allege that there are
23 other outlets. They do allege it. They do allege that
24 there are other outlets. What they don't explain is why
25 those other outlets are not interchangeable. Why are they
26 not functional equivalents for a passenger to buy a ticket.

Proceedings

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2 THE COURT: Well, do they have to explain or
3 merely allege that they are not?

4 MR. COHEN: They have to allege that they are not.
5 That's the critical point of making them plead a real
6 market at this stage of a case, because, otherwise, you'd
7 wind up with a fake case going forward for months on a
8 market that gets overturned at the end of the day because
9 it was defined arbitrarily and narrowly to plaintiff's own
10 business rather than the entire marketplace where there
11 were available products.

12 And in this case, the price of tickets is the same
13 as every one of these markets -- every one of these
14 distribution channels, so there is complete
15 cross-elasticity across the distribution channels.

16 And they have, in fact, alleged --

17 THE COURT: Well, my recollection is that their
18 description is that there are locations and there are
19 locations, and not all locations are equal; that the
20 industry is dominated by sales through certain locations,
21 and it is that control of those locations that they say
22 controls the market.

23 MR. COHEN: That is -- that's their allegation,
24 Judge. That is their allegation. But they have to -- they
25 do have to allege -- but they haven't alleged how much are
26 going through any of these channels. They haven't alleged

1 Proceedings

2 any basis for their claim that the primary channel is
3 hotels. And I understand, I can get into facts in the
4 preliminary injunction side --

5 THE COURT: Under the Donnelly Act, how specific
6 do they have to make these allegations? There is nothing
7 in the CPLR that requires this kind of specificity? Is
8 there something in the act?

9 MR. COHEN: There is something in the case law
10 that requires it, Judge. There is not something in the
11 act. This is a development of case law, and, of course,
12 the Donnelly Act, as the court is well aware, is mirrored
13 on the Sherman Act. In fact, it was one the few state
14 statutes passed within years of the Sherman Act in 1898.
15 It had a long history of parallel adoption of Sherman Act
16 cases. And the Sherman Act, the Federal Court cases all go
17 in this direction, as do some of the state court cases,
18 that we have cited as well under the Donnelly Act.

19 The Laprosetti (phonetic) case in particular, that
20 we cited to the court, adopts the rule of
21 interchangeability and indicates and follows the federal
22 precedent on this court.

23 THE COURT: What court was that?

24 MR. COHEN: The Laprosetti court was the New York
25 Supreme Court; Judge.

26 THE COURT: What's the appellate division?

1 Proceedings

2 MR. COHEN: It was the Supreme Court, Kings
3 County, your Honor.

4 THE COURT: Nothing better than that? I'm sorry.
5 But it's -- I'm simply not bound by it. It's a coequal
6 court and it's not even in my Department.

7 MR. COHEN: Putting aside -- understood.
8 Understood, your Honor. That doesn't mean it's not right.
9 And it doesn't mean that it's not influential.

10 THE COURT: That means I've got to do some more
11 work.

12 MR. COHEN: And let me talk about the federal, the
13 two federal cases that matter here, your Honor, on this
14 issue, because the federal cases all make the point and
15 they are quite uniform.

16 The Supreme Court in the Dupont case first
17 announced the rule of interchangeability and
18 cross-elasticity that we have been discussing.

19 THE COURT: What authority, appellate authority do
20 we have in New York that adopts these two rules?

21 MR. COHEN: Judge, the only case that we have
22 cited under the Donnelly Act that talks about the rules of
23 law is the Laprosetti case.

24 The other cases that we cite are all federal cases
25 and we are relying on those federal cases.

26 THE COURT: Strike two.

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Proceedings

MR. COHEN: Let me go back to my whiff, and I know it's gone by, but I would say, Judge, that the federal cases matter. The federal cases matter. They are interpreting --

THE COURT: I'm not saying that they don't, but we're dealing in a situation where the New York courts simply haven't ruled. They haven't. It's nice that somebody over in Brooklyn writes a decision, but I like to look at the Court of Appeals or at least the Appellate Division. It's a New York statute that's been on the books for over a hundred years.

MR. COHEN: It has, Judge. And these market definition issues have largely come through the federal cases.

THE COURT: All you've got to do is show me a nice Appellate Division, First Department, or Court of Appeals case saying that's the case in New York state, and I'm with you a hundred percent. I don't think it exists.

MR. COHEN: We'll try to follow up and find that case for the Judge.

Your Honor, if you would allow me, I would like to talk about one of the federal cases that's relatively recently kind of matters in this area.

THE COURT: No, I'm not -- I want to hear on the avocation for the preliminary injunction. Let's shift

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gears now. The motion to dismiss is going no place.

MR. BERMAN: Your Honor, you know some of the facts already, but let me briefly go through them and let me go through the standards. What we must demonstrate are irreparable harm, likelihood of success on the merits, and balance of the equities.

My client is over a-hundred-year-old company. What they do is they run concierge desks in hotels. Presently, based on defendants' exhibits, they have desks in hotels that control about 45 percent of the New York City market. They have changed what their basis is. Now it's 37 percent of the New York City market, the rooms in which my clients have desks. Ninety-five percent of my client's business is from the hotel desks.

We put in an affidavit, unrebutted, from a general manager of a hotel, the Holiday Inn, 600 rooms, a major player in the city, that says if my client is not able to appropriately be able to timely immediately sell the double-decker bus tour tickets, they take umbrage, they say this is not the number one tourist event concept in the city. It is. They give numbers. It's 45 million visitors in the city, they only sell a million-and-a-half, that's three to four percent. Three to four percent of one thing? It's huge. It is the number one, because unlike going to the Empire State Building where you are there for

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20 minutes, you're on the double-decker bus all day as you are visiting the city. This is the number one.

The Secala affidavit says, If you cannot be able to get me, my client, my customers, double-decker tour bus tickets, you're not full service, you're not compliance, you are effectively out of business.

This is my client's business. If we can't get the tickets, or if we can't get them timely and appropriately, we're done. We're gone.

This is not a commissions case, and it's not. Commissions is, okay, you can calculate. We are out of business.

Now, interesting, unrebutted by the hotel defendants, who are in the same business as the gentleman GM of Holiday Inn, they put in an affidavit that says, You know, it's not the number one tourist attraction, you know, if a concierge can't sell this appropriately? We wouldn't terminate him.

Silence from the hotel defendants. They could have done something to say that this GM of the Holiday Inn is wrong. If we're out of business, that's irreparable harm. It's not a commissions issue. We wouldn't be here if it's a commissions issue.

You will hear from the other side, Oh, no, no, there are other ways of getting these tickets, and,

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2 therefore, how can we be out of business? They say we
3 should go run after one of the guys on the corner and say,
4 Can we have a thousand tickets please for the people in the
5 hotel? Or we should go to the visitors -- one of their
6 visitors centers, 20 blocks away, which is like kiosks at
7 the zoo, you can say, Can I have one of these, one of
8 these, and one of these. My clients want professional,
9 high-end concierge desk, multilingual, your Honor, they
10 give advice, and they say, You know what? There is another
11 way. You go on the Net and then buy the tickets. We're in
12 the high-end concierge business. We have a desk the size
13 perhaps of the jury box in various hotels. What they say
14 is, Do you know how you solve your problem?

15 By the way, I asked and you asked during the oral
16 argument in March, Are you guys going to stop selling the
17 tickets to my clients, you know, via the way you are doing
18 it now? No answer. You read the affidavits now? They
19 don't say that. What they say is, Go knock yourself out.
20 Go on the Net. So we should have everyone line up, my
21 client should get, you know, ten terminals. That's not a
22 concierge business. They want to make our concierge desks
23 into a visitors center. There are no alternatives.

24 So the answer is, from an antitrust perspective
25 you've heard on the motion to dismiss argument, I couldn't
26 see anything more replete with facts.

1 Proceedings

2 THE COURT: What about using an Internet
3 connection with a printer? Can you print out the tickets
4 immediately?

5 MR. BERMAN: So what would happen is, let's say I
6 have an Internet, so I do mberman -- Mark Berman -- at
7 CGSC -- ContinentalGuest.com -- you log onto CitySights, or
8 whatever, and --

9 THE COURT: I come up.

10 MR. BERMAN: Judge Ramos comes up to the desk,
11 exactly, Charles E. Ramos, your address, they type it in,
12 credit card number, put it in, all the other information --

13 THE COURT: Or couldn't you have an account with
14 them, obtain the ticket and then sell the ticket to me?

15 MR. BERMAN: Well, what happens then is -- well,
16 let's say I do mberman because I'm the --

17 THE COURT: Or the ticket comes out in the name of
18 the customer?

19 MR. BERMAN: Yes. So, but you need an Internet
20 connection. But let's say --

21 THE COURT: If I'm going to ride the bus, I've got
22 to be me.

23 MR. BERMAN: Right. That's my understanding. And
24 so, they log on, CitySights, or Gray Line gets the request,
25 Oh, it's at ContinentalGuest.com. We're not going to do
26 it. It's not their business. They want to put us out of

1 Proceedings

2 business. Once they see the domain name, CGSC.com, we're
3 finished. We're done. They might say otherwise.

4 Well, the record, and you heard from counsel on
5 the motion to dismiss that our pleadings are
6 insufficient --

7 THE COURT: I'm thinking now in terms of how we
8 can work this out so everybody goes home and leaves me
9 alone.

10 If you have the ability and we have an agreement
11 by everyone else to permit you to get these tickets online,
12 have a printer available at your concierge desk, who
13 doesn't have a computer these days?

14 MR. BERMAN: Your Honor, what happens is at the
15 hotel, it's a desk about yea big, you have a lot of people,
16 it's like going to the -- what will happen is, we don't do
17 it the way they are doing it now, ends up being like the
18 airport. You will have your long line, they will take all
19 of your information, it will take bloody forever. And then
20 the next thing you know, you know what? I'm done. I'm
21 gone. It's a concierge business. We're not trying to open
22 up a kiosk business. And if we can't do this job properly,
23 we're not a full service. We're not trying to convert us
24 into a visitors center. We are a high-end concierge
25 business.

26 So from an irreparable harm point of view, it's

1 Proceedings

2 not a commissions case. We are out of business.

3 THE COURT: When your client sells theater tickets
4 to someone, aren't those tickets generated by computer?

5 MR. BERMAN: The theater tickets? Someone comes
6 and says they want to see a theater, they come to the desk,
7 and they will log in and see if it's available, and then
8 they'll say, Go pick them up at the theater. So the answer
9 is no, they will just say, Your name is waiting at the
10 Broadhurst Theater, go pick it up.

11 So irreparable harm, we're not talking access.
12 We're talking out of business.

13 THE COURT: After we're done today, you fellows
14 are going to go to mediation because this case can be
15 settled. I know it can.

16 All right. Continue.

17 MR. BERMAN: So my -- first I have to establish
18 irreparable harm. This is not a case where it's one line,
19 if you will, your Honor. They cite to many cases where --
20 which is a beer case, we're getting rid of the Schmidt's
21 line, 23 percent. I have record evidence it puts us out of
22 business. They don't have record evidence it doesn't put
23 us out of business. So from a balancing of the equities,
24 your Honor, there are no equities in their favor. Right
25 now, we are servicing all the clients, all the hotels.
26 We're doing a good job. Everybody is happy. The hotel

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2 guests are getting serviced. The only thing from an equity
3 point of view is they want to go into our business. It's
4 very nice they want to go into our business, and they will
5 lose a couple hundred thousand dollars, they've hired some
6 people, done some computer work. And the answer is, your
7 Honor, equities.

8 Let's talk about the harm to the public. We have
9 sitting in the back of the room, your Honor, Assistant
10 Attorney General James Yoon.

11 THE COURT: I was going to ask, is the AG going to
12 step in at all?

13 MR. BERMAN: He's back there.

14 MR. YOON: Good morning, your Honor.

15 THE COURT: Do we have your appearance on the
16 record?

17 MR. YOON: No, your Honor. I was invited. We're
18 not a party to this case.

19 THE COURT: But before you speak, we have to know
20 who you are for the record. Give us a card.

21 MR. YOON: James Yoon, Assistant Attorney General,
22 Antitrust Bureau, New York State Attorney General's office.

23 THE COURT: My first question obviously is, is the
24 Attorney General's office going to intervene in this case?

25 MR. YOON: At this moment we have no intention.
26 We have filed with the Surface Transportation Board. We're

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not a party to this case.

THE COURT: I see. Thank you. Sorry.

MR. BERMAN: Anyway, since Mr. Yoon spoke about the Surface Transportation Board, just to review the bidding for your Honor, a month ago today, on April 27th, there was oral argument in Washington DC before the Surface Transportation Board, that was formerly the ICC, and before them is the issue of the approval of the combination of the two entities. Mr. Cohen spoke on behalf of the applicants, Mr. Yoon spoke on behalf of the Attorney General, and I also spoke on behalf of Continental Guest. No decision has been rendered at this point.

And, so right now, maybe the answer is up to you, your Honor, the preliminary injunction/TRO stays in effect until they rule, but if they do rule, they are either going to say the combination is appropriate, they are going to reject it, or they are going to put some conditions on it.

But a couple things are clear. Before the Surface Transportation Board is not the issue of the hotels. It's not the issue of the predicate for our claim, your Honor, which is that the reason this moves away from the equities, it moves more towards the likelihood of success on the merits. But the issue which is a predicate for our claim is that the reason why they are seeking to go into the concierge business is to protect their horizontal, almost

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virtual monopoly in the double-decker tour bus industry.

While the Attorney General has raised the issue and has said barrier -- what's going on will create barrier venturing. Issue is not joined on our theory, if you will, that they are going into this vertical market in order, your Honor, in order to insulate and preserve their horizontal market. The case law, and it's in our brief, says that is inappropriate under the federal antitrust laws and, by analogy, the Donnelly Act. And it is true there are fewer antitrust cases reported under the Donnelly Act. But there is no issue that you can't, and it is a violation of the antitrust laws, whether you want to call it federal or state, to go into the vertical market in order to protect your horizontal market.

Now, the affidavit from the defendant says, your Honor, We didn't do it for that reason, we did it for economics, economy of scale, it's the right thing for us to do, we'll save money. Your Honor, I dispute that. We dispute that. And on a likelihood of success on the merits, that is our theory.

And we haven't had discovery in this case. I have sought discovery from the other side. There is no motion to stay in this courtroom. I have been here before. When they moved to dismiss, your ruling specifically says no. And basically they said, Jump in the lake, we've made a

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2 motion to dismiss, your complaint is frivolous, I'm not
3 providing discovery. So, I am here now on oral argument on
4 a preliminary injunction, having gotten no materials, the
5 case law they allege and rely upon are all federal cases,
6 after expedited discovery, and full preliminary injunction
7 hearings. So what do I have to support my factual position
8 that you should extend the TRO and say that there is a
9 likelihood of success of a violation of the antitrust laws,
10 monopolization, restraint of trade, and attempted
11 monopolization.

12 Now, attempted is important because of course
13 while they own the double-decker sightseeing tour bus
14 market in New York, they are trying to get into the
15 vertical concierge market. They cite a Second Department
16 case that says there is no attempt at monopolization.

17 Your Honor, I've cited replete, five or six cases
18 from the First Department and other courts that say
19 attempted monopolization is a viable claim in New York.
20 And indeed the precise wording of the Donnelly Act when you
21 look at it, it is "or may be restrained." "...in the
22 conduct of any business, trade or commerce or in the
23 furnishing of any service in this state or may be
24 restrained." So the wording of the Donnelly Act says
25 "may."

26 Except for the one Second Department case they

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2 relied on, all the other cases say attempted monopolization
3 is a viable claim.

4 Now, what do we have to prove on likelihood of
5 success on the merits? We haven't gotten discovery. One
6 document. How did we get this document? Mr. Yoon from the
7 AG's office and the bus company defendants. There was a
8 subpoena served. Apparently they agreed on some informal
9 discovery. I'm not privy to that. Apparently -- and I
10 don't know what went on, apparently there was a submission
11 by the New York Attorney General for the Surface
12 Transportation Board in confidential redacted form. There
13 was a skirmish in Washington about Mr. Yoon's submission,
14 and the skirmish was decided presumably in favor of the
15 Attorney General, and on their Website by the Attorney
16 General, the Attorney General submission, came down their's
17 in redacted form but with one exhibit. Okay. I pull it
18 down, as I'm entitled to pull it down, and there is motion
19 sequence 005 which is before your Honor next week saying I
20 shouldn't have gotten that document, it should be sealed,
21 it should be confidential.

22 I'll tell you about the one document I have, that
23 they are very upset that I have, it says the following:

24 "Easier --" this is Exhibit C to our reply
25 affidavit, last page:

26 "Easier decision-making as sole player in the

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double-deck market."

Okay. I can go through the findings and conclusions of the AG's economic expert that goes through all the monopolization exactly, and I'm prepared to do that, but I tell you, your Honor, here is the one document that says sole player, double-deck. We win, there is a monopolization, done, over with horizontally.

Now, listen to this. "A combined entity will be better positioned to deal with a new market entrant." Well, there it is. Your barrier of entry. When you read the papers after oral argument today, you're not going to see the words "barrier of entry" in the defendant's papers. That's not a good thing if they have gone into the vertical market to create a barrier of entry.

But, no, your Honor, we're wrong. We would never have done that for that reason. I say that's not true. I say I have one document to help us prove our case.

Let me give you our other hard evidence, if you will, that says they went into this vertical market to protect their horizontal market, which you're not allowed to do. The cases I've shown you said you're not allowed to do. They contest that predicate.

You want to know the fact? We have taped conversations with your client, and let me play them now, your Honor, admitting that's what they did.

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2 THE COURT: If you have them in written form.

3 MR. BERMAN: Yes, I do. We are prepared to pass
4 out the transcript.

5 MR. COHEN: Your Honor, objection. We have never
6 seen this, heard this, they have never --

7 MR. BERMAN: Absolutely not. They have never seen
8 it or heard it, and their client said it.

9 MR. COHEN: None of this has ever been submitted
10 in the record, and we should have an opportunity to review
11 and understand where this is coming from. It's not even
12 admissible.

13 MR. BERMAN: We would have gotten it if we would
14 have had discovery and depositions. They violated this
15 court's rules.

16 THE COURT: You're not going to get depositions
17 until an answer is filed, but you do get documents.

18 Turn that off. Turn that off.

19 MR. COHEN: Judge, this has really gone too far.
20 If he had this information, he certainly could
21 have produced it before today.

22 THE COURT: Your objection is sustained. He
23 cannot submit anything that hasn't been submitted to the
24 other side.

25 If you want to have a hearing, and we can always
26 have a hearing, that will be one of your exhibits. That's

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2 fine. But this is on a motion, no. We don't litigate
3 motions by surprise.

4 MR. BERMAN: No, but what we do do is produce
5 documents. What we do do is don't fight and hide documents
6 and fight about the confidentiality of this document, and
7 they are very upset I have it.

8 My burden, your Honor, is to show you success of
9 the merits. I have admissions -- I'll pass out the
10 transcript -- of what a representative of the defendants
11 said, and what the key representative said is that they are
12 doing this to secure the market. That's it. Over and out.
13 So we have established, and that's why, your Honor, in all
14 their cases, in all their cases, the federal cases, there
15 are preliminary injunction hearings.

16 MR. COHEN: Your Honor, we're going to make the
17 same objection. It's just more of the same. We don't know
18 what this is, how it was obtained, where it came from. We
19 have never seen it.

20 MR. BREEN: No authentication.

21 MR. BERMAN: The references are in the complaint.
22 Of course they're upset. I would be upset too, except they
23 didn't have a right to do what they did on the documents.

24 MR. COHEN: Judge, this isn't a matter of being
25 upset. It's just a matter of evidence.

26 THE COURT: If you want to make a motion to compel

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2 them to -- and I hope we don't have to waste our time with
3 that, to compel them to produce documents, that's one
4 thing. If we need to have a hearing or further proceedings
5 here, you can serve a copy of this transcript with whatever
6 affidavit is necessary to make it something other than pure
7 hearsay, fine. Someone has to identify it.

8 MR. BERMAN: It would be authentication. It
9 wouldn't be hearsay because it's admissions by the clients.

10 THE COURT: Listening to a tape, I don't know
11 who's speaking.

12 MR. COHEN: We object to that. We don't know if
13 it's an admission. From what I've seen in this transcript,
14 it doesn't appear to be us.

15 THE COURT: Just so we don't keep everyone,
16 including the court, in complete suspense, who is speaking?
17 Who are the two or more speakers on this telephone
18 conversation?

19 MR. BERMAN: On four to five sound bites I was
20 going to present to you, his name is Shimi Kluger. Shimi
21 Kluger is a representative and cousin of Mark Marmurstein,
22 principal of the defendants. In the fifth one, it's Mark
23 Marmurstein himself.

24 MR. COHEN: Judge, that's incorrect with respect
25 to the person they name as a representative. That person
26 is not a representative of any of the bus defendants. And

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we have no knowledge of what the heck he's talking about.

MR. BERMAN: He was sent as an emissary to talk to my client.

MR. COHEN: Mr. Marmurstein is of course the president and CEO of Twin America.

THE COURT: What I would suggest that you do is make a copy of the tape available to the defendants if and when they make a demand for it.

Why weren't documents or at least responses given?

MR. COHEN: Judge, may I remind the court, under the initial schedule, there would not have been time for discovery in this case in any event. We got a two-week hearing turnaround.

THE COURT: I don't want to get into an argument with you, but the CPLR makes it very clear, a document demand can be served with a summons.

MR. COHEN: There were no document demands.

THE COURT: So there were none?

MR. COHEN: No.

MR. BERMAN: Not with the summons.

MR. COHEN: That's why I wanted to -- if I may, Judge?

THE COURT: I'm just saying they can be.

Now, so time is not an issue now. Were document demands served?

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2 MR. BERMAN: Document demands were served, and the
3 form objection said, CitySights objects to the request on
4 the ground it was filed with a motion to dismiss, has
5 requested a stay of discovery, part of motion sequence 004,
6 not by order to show cause, but ordinary notice of motion.

7 THE COURT: Your documents are due --

8 MR. BERMAN: This case lacks merit.

9 THE COURT: -- within seven days, five business
10 days. Get it done.

11 MR. COHEN: We will.

12 We also made other objections to the document
13 request with respect to the scope, time period, what they
14 were asking for --

15 THE COURT: Those objections we can rule on so
16 long as those objections were timely served.

17 MR. COHEN: Indeed they were, Judge.

18 THE COURT: Then make the appropriate motion.

19 MR. BERMAN: On the hotel defendants, they didn't
20 respond.

21 THE COURT: Listen, fellows. It's nice to see you
22 guys. We already spent an hour on this case. I'm not
23 unfamiliar with it.

24 The motion is marked submitted, both sides. The
25 TRO is continued.

26 MR. ZUCKERBROD: Your Honor, I represent the hotel

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2 defendants, and I would like to be heard just briefly on
3 our position.

4 THE COURT: Yes.

5 MR. ZUCKERBROD: Your Honor, Alan Zuckerbrod from
6 the firm of Siller Wilk.

7 We also have a motion to dismiss the claims.
8 There are two causes of action against the hotel
9 defendants, one for breach of contract, one for unfair
10 competition.

11 There are 11 hotel defendants, seven of whom have
12 contracts, separate contracts, with the plaintiff in which
13 the plaintiff is to provide concierge service. Those seven
14 contracts provide the unquestionable right to terminate
15 those contracts on our client's part without cause.
16 Notices were sent in a timely manner. Plaintiff has
17 objected.

18 There were four other hotels that required cause.
19 Notices of termination were sent for those. Those notices
20 were rescinded.

21 There is no doubt that the hotel defendants should
22 not be compelled, despite and whatever happened on the
23 antitrust side, but the hotel defendants, because of their
24 contractual rights, could not be compelled to be in
25 business with the plaintiff if they choose not to do so.
26 It's not an issue of fact. It's an issue of plain language

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of the contract.

So as a matter of law, we believe that the ninth cause of action for breach of contract can be dismissed and should be dismissed and, as a result, there is no likelihood of success, and no reason that the hotel defendants should be somehow enjoined to continue this relationship.

Secondly, on the injunction issue, clearly if there had been or was or is an improper breach of contract, that can be compensated in terms of monetary damages. Again, no right to an injunction against the hotel defendants. We believe the contracts are clear and allow for their dismissal.

There is a second, another cause of action for unfair competition. It's pleaded very vaguely. We incorporated by reference some of the arguments that the bus company defendants made in their motion as to why that claim should be dismissed. Plaintiff came back and said, Well, you don't have to -- and in our arguments, we said there is no unfair competition, it's an antiquated cause of action that requires misappropriation and palming off.

CGS came back and said, Well, you don't really need misappropriation, there is a cause of action. They cited a case that your Honor decided five years ago called the Lewis Capital Markets case which they discuss in their

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2 brief and we discuss in our reply. And that case, in fact,
3 says -- that was a case involving corporate espionage and a
4 mole, and that case clearly says, Because they were
5 stealing, misappropriation, there is a viable claim for
6 unfair competition.

7 Here, the hotel defendants have not stolen
8 anything. All they have done is sought to exercise their
9 right to terminate their contract. I submit that whatever
10 happens on the antitrust side, we're getting sucked up in
11 something where we don't belong, and the hotel defendants
12 should be dismissed from this case.

13 THE COURT: Thank you.

14 MR. COHEN: Judge, I do have one thing to add.
15 It's very, very important to the form of the relief or the
16 TRO that you continued.

17 THE COURT: Yes.

18 MR. COHEN: If I may?

19 THE COURT: Sure.

20 MR. COHEN: I want you to -- in order to
21 understand this, Judge, I would like to hand up what it is
22 that the plaintiffs distribute, what they say they need,
23 the access to these tickets, so that you can see. It's a
24 voucher. I will be very direct and very quick, Judge, as
25 to the form of the relief.

26 THE COURT: What's the problem? Articulate it

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2 please.

3 MR. COHEN: The basic problem is this, Judge. The
4 TRO that they have obtained goes well beyond the relief
5 they have stated is irreparable. They say that they need
6 access to these ticket vouchers in order to distribute
7 these ticket vouchers to their hotel guests. Your Honor
8 picked up on the fact that these ticket vouchers are the
9 very same that they could print out from the Internet.

10 But without even going there, what they are not
11 entitled to, Judge, is a commission. They can have these
12 ticket vouchers to their heart's delight, but they should
13 have to pay us full price for them, just like anybody else
14 that works from the Internet, or anybody else that would
15 come to us for them.

16 The TRO should not be that broad as to interfere
17 with or impose an obligation on us to actually pay them a
18 35 percent fee to distribute these vouchers. That access
19 remedy would completely solve any preliminary harm in this
20 case, they could go on competing, we could enter the market
21 and ourselves compete --

22 THE COURT: He's got a good point.

23 MR. COHEN: -- and everybody will have access to
24 the tickets.

25 THE COURT: He has a good point.

26 MR. BERMAN: Your Honor, the commission that they

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2 pay us, it's not a commission. This is not a commission
3 issue. The reason is, we go on -- we talked about it
4 before, what we would need to do is go put down ten
5 terminals, and each of these --

6 MR. COHEN: Judge, I'm saying they could have
7 this, just what they have now, what they have, but they
8 have to pay us for it. And then we should be allowed to
9 enter the market, everybody has access to the same tickets,
10 there can be no irreparable harm.

11 MR. BERMAN: They shouldn't be allowed to enter
12 the concierge desk market pending your decision because
13 what they are doing is going into the concierge market to
14 protect their horizontal.

15 MR. COHEN: No.

16 MR. BERMAN: That is not permissible because --

17 THE COURT: Articulate both of your positions in
18 letters, get them to me by Monday, and I will consider a
19 modification of the Temporary Restraining Order.

20 MR. BERMAN: Your Honor, we have the TRO in place.
21 The preliminary injunction was slightly broader than the
22 TRO.

23 THE COURT: I'm not granting the preliminary
24 injunction now.

25 This is submitted. The TRO is continued, and I
26 will consider the modification. You get letters to me,

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serve each other, and get me a package.

MR. BERMAN: Can we do it on Tuesday since Monday is a holiday?

THE COURT: Yes, fine. I won't be here.

MR. BERMAN: How long? Are there any page limitations?

THE COURT: No page limitation. Do your \$10,000 letter. I don't care.

MR. COHEN: I'm going to do less than that, Judge, and I will leave you with the voucher if you would like, Judge, to make it clear.

THE COURT: I get car sick on busses.

Thank you very much.

(At this time the proceedings were concluded.)

-oOo-

C E R T I F I C A T I O N

This is to certify the within is a true and accurate transcript of the proceedings as reported by me.

William L. Kutsch, SCR